No. 90-962

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ALAMO RENT-A-CAR, INC.,
a Florida corporation,
Petitioner,
vs.
SARASOTA-MANATEE AIRPORT AUTHORITY,
a political subdivision of the
State of Florida,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER, ALAMO RENT-A-CAR, INC.

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December __, 1990

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QUESTIONS PRESENTED

1. Does the Resolution of Respondent Sarasota-Manatee Airport Authority ("Authority") imposing on Petitioner Alamo Rent-A-Car, Inc. ("Alamo"), an interstate off-Airport business, user's fees measured by 10 percent of its gross receipts from interstate customers for their off-Airport car rentals, violate the Commerce Clause because the fees are not reasonably related to Alamo's Airport use (limited to providing its patrons free transportation from an Airport curb to its business location) nor to the Authority's costs in providing the facility?

2. Does the Authority's Resolution discriminate against interstate commerce in violation of the Commerce Clause because both the purpose and the effect of the challenged user's fees were to burden interstate car rental businesses to protect the Authority's intrastate revenues from its on-Airport car rental tenants?

RULE 28-1 LISTING

The stock of Alamo Rent-A-Car, Inc. and its affiliates is not publicly traded.

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OPINION BELOW

The Opinion of the Court of Appeals (P. App. A)[1] is reported at 906 F.2d 516 (11th Cir. 1990). Petitioner's timely Petition for Rehearing in Banc was denied by an unpublished order filed October 17, 1990. (P. App. B.)

[1] "P. App." refers to the Appendix annexed to this Petition.

The district court's judgment was entered on November 16, 1988. J.S. "D." ("J.S." refers to the Joint Stipulation regarding exhibits filed in the 11th Circuit.) The district court's unpublished order was dated November 15, 1988. J.S. "E".

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF THE FEDERAL CONSTITUTION, FEDERAL STATUTE, AND AUTHORITY'S RESOLUTION INVOLVED

Article I, Section 8 of the United States Constitution provides in pertinent part:

> "The Congress shall have Power . . . To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The Anti-Head Tax Act, 49 U.S.C. § 1513(a) provides in pertinent part:

> "No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce . . . or on the gross receipts derived therefrom. . . . "

49 U.S.C. § 1513(b) provides, in pertinent part:

> "Nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

49 U.S.C. § 1301(23) provides, in pertinent part:

> " 'Interstate air commerce', . . . mean[s] the carriage by aircraft of persons or property for compensation or hire . . . whether such commerce moves solely by

aircraft or partly by aircraft and partly by other forms of transportation."

The Resolution of the Sarasota-Manatee Airport Authority, adopted July 27, 1982, provides in pertinent part:

. . .

WHEREAS, a rental car business not having one of the rental car concession contracts or leases with the Airport Authority for the privilege of having offices on the Airport from which to conduct rental car business is defined as a 'non-tenant rental car business';

NOW, THEREFORE, be it resolved by the Sarasota-Manatee Airport Authority as follows:

. . .

Section 7

1. A person, persons or corporation desiring access to the Sarasota-Bradenton Airport for the purpose of conducting rental car business operations, either directly or indirectly, shall first obtain from the ... Authority a Rental Car Non-Tenant Business Permit prior to conducting any such business on Airport property.

. . .

3. The . . . Authority may issue a Rental Car Non-Tenant Business Permit only upon receipt of a signed and verified application from the rental car business owners containing the following information, agreements and proof:

...

F. A written agreement to pay for the duration of the permit, ... [to the] Sarasota-Manatee Airport Authority 10% of all gross business receipts per month ... payable on the 10th day of each month for the preceding month's receipts.

...

J. A written agreement to submit written proof to the Airport Authority of *all* gross receipts at the time payment is due, accompanied by a statement certified by an officer of the company attesting to the accuracy of payments due the Authority.

...

L. A written agreement that vehicles will stop while only the in the process of loading and unloading customers with bonafide reservations ... Drivers of vehicles (or company personnel that may accompany them) shall be prohibited from solicitation of business in any manner whatsoever upon the Airport. The operation of vehicles will be specifically limited to the picking up and delivery of pre-reserved customers.

M. A written agreement to park only in the parking and pick-up area designated for non-tenant rental cars ...

4. A Non-Tenant Rental Car Business permit will permit the business to pick up customers at the terminal in a designated and signed van, or other

motor vehicle, provided that no Non-Tenant Rental Car Business shall operate more than one designated motor vehicle on Airport property at the same time.

5. A Non-Tenant Rental Car Business permit shall not permit a business to have an office or station on Airport property, to park rental cars on the property, or to operate rental cars on Airport property; and all of these actions and activities are expressly prohibited.

6. A Non-Tenant Rental Car Business permit is required in order to advertise a Non-Tenant Rental Car Business on Airport property and in order to place a non-tenant a Non-Tenant Rental Car Business telephone on Airport property; however, fees for such advertising and telephones are not included in the permit fees and charges. Advertising and telephone fees, charges, and location must be negotiated separately in addition to permit fees and charges. A Non-Tenant Rental Car Business not having a non-tenant rental business permit shall not advertise on Airport property and shall not place a telephone on Airport property.

. . .

8. There shall be a charge of $100 payable in advance to defray administrative costs of a permit request for each permit . . . "

STATEMENT OF FACTS

Pursuant to Florida statute, Respondent Authority, a political subdivision of the State, owns and operates the

Sarasota-Bradenton Airport ("Airport").[2] The Legislature granted no taxing power to the Authority. The Authority receives 95 percent of its capital expenditures from the Federal and State Governments.[3] Its remaining capital expenditures and operating costs are funded primarily by intrastate income from rents and fees that it receives from its on-Airport tenants, from on-Airport concessionaires, from airlines for landing and ground services, and from permitees. For the relevant years, the Authority's income from its on-Airport tenants and permittees exceeded its operating expenses.[4]

In 1976, the Authority executed leases and concession agreements with five rental car companies to provide on-Airport rental car service to airline passengers. These contracts require the tenants to pay specified rent plus

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[2]Chapter 77-651, § 6, Laws of Florida (the "Enabling Act"); R. 4-118-8. ("R." refers to the record on appeal to the 11th Circuit.

[3]The Federal Government provides 90 percent of the funding for approved capital expenditures, and the State provides 5 percent of such funding. The Federal Government imposes 8 percent tax on each airline ticket to defray its costs.

[4]In 1983, the total Airport operating revenue was $3,841,263.00; Airport operating expenses were $2,350,829.00; and its retaining earnings at year-end were $8,501,056.00. In 1984, the total Airport operating revenue was $3,669,307.00; total Airport operating expenses were $3,072,293.00; and retained earnings at year-end were $9,475,674.00. P. Ex. 130 at 3. These figures do not include revenue derived from the challenged Resolution. The Resolution was passed before the Authority approved expansion plans for the Airport. The reference to "new facilities" in the initial draft presented to the Authority was deleted before the Resolution was adopted. R. 10-87-89. ("P. Ex." refers to individual exhibits introduced in the District Court which were part of the appellate record.)

"concession" fees measured by 10 percent of the tenants' gross income.[5]

In 1978, Alamo built its off-Airport facilities to serve interstate travelers, primarily those who reserve rental cars as part of their thrifty vacation packages arranged by travel agents and tour operators.[6] Like off-Airport hotels and parking lots, Alamo furnishes free shuttle vehicles to transport pre-booked travelers to its site.[7] Its shuttle vehicles constitute 1 percent of the total vehicular traffic at the Airport.[8] It is undisputed that Alamo is engaged in interstate commerce.

By 1981, the Executive Director of the Authority, Albert L. McDill ("McDill"), became concerned that the Authority's gross receipts fees from its on-Airport car rental tenants were being reduced by competition from off-Airport car rental companies.[9] That concern was shared by Board members of the Authority in April and

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[5] In exchange, the tenants received on-Airport counter and service facilities (R. 5-143-2), on-Airport facilities for maintenance, service and storage of vehicles. The tenants also received a covenant that the authority would use its best efforts to prevent off-Airport rental car companies from "advertising, engaging in or soliciting automobile rental business in the terminal facilities" (RT-13-14), and a covenant that no more than five on-Airport rental car companies would be accepted as tenants. R. 4-142-11).

[6] R. 6-210-16, 219, 254.

[7] J.S. 124 at 72-84, 97, 99.

[8] P. Ex. 151. The vast majority of vehicular users of the Airport are members of the traveling public who pay no fees for Airport access. *Ibid.*

[9] R. 10-24, 25.

June, 1982.[10] McDill presented the Authority with alternatives for charging fees to off-Airport businesses using shuttle vehicles; no decision was reached and the proposals were temporarily tabled.[11]

Before the Authority's next meeting, McDill read an airport industry newsletter discussing a decision by a federal district court in Biloxi, Mississippi, upholding user's fees imposed on off-Airport rental car companies measured by 10 percent of their gross receipts.[12] He obtained a copy of the Biloxi Resolution and copied it virtually verbatim for presentation to the Board. The Authority adopted the Resolution without debate.[13]

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[10] One of the Board members emphasized a "need to take . . . action" because of "the revenue that's lost to some of our concessionaires . . . of which we get a cut." P. Ex. 63 at 6.

[11] Most of the discussion by the Board focused on proposals involving a per-trip fee for each vehicle together with a monthly fee. At that time McDill agreed that $100.00 per day could very well be excessive in relation to Alamo's use. P. Ex. 63; R. 10-29.

[12] R. 10-34, 35.

[13] P. Ex. 64; R. 10-33-42, 74.

Airport authorities across the country quickly followed Biloxi's lead. Litigation challenging gross receipts fees imposed on off-airport car rental companies likewise spread across the Nation. *E.g., Epps Aircraft, Inc. v. Montgomery Airport Authority,* No. 89-916 (pending, Alabama Supreme Court); *Alamo Rent-A-Car, Inc. v. City of Palm Springs,* No. 89-55862 (appeal pending, 9th Cir. 1990); *Alamo-Rent-A-Car v. Board of Supervisors of Orange County,* No. 584170 (pending before Orange County, California Superior Court); *Alamo Rent-A-Car v. The City of Los Angeles, et al.,* No. C 747508 (appeal pending, California Court of Appeal); *Westrac, Inc. v. Walker Field,* No. 89 CA 1993 (pending before Court of Appeals, State of Colorado); *Thrifty Rent-A-Car v. City and County of Denver,* No. 89 CV 10882 (District Court, Denver, Colorado); *Allright Colorado, Inc., v. City and County of Denver,* No. 89-1379, 90-1003 (pending before 10th Circuit); *Alamo*

McDill admitted at trial that the gross receipts charge was unrelated to Alamo's Airport use or the Authority's costs; the Authority was "unconcerned about the costs since we were not providing services nor facilities."[14] The Authority's purpose in adopting these fees was to protect itself from reduction of its intrastate income from its on-Airport car rental tenants.

The Authority did not impose user's fees measured by gross receipts on any off-Airport businesses other than car rental companies although their use of the Airport was indistinguishable from Alamo's.[15] Instead, hotels, motels, and valet parking lots were charged flat fees of $100.00 per month or $800.00 per year per vehicle,[16] while Alamo was charged more than $200,000 for similar usage of the Airport.[17]

Alamo filed suit in July, 1982, in the United States District Court for the Middle District of Florida seeking injunctive and other relief challenging the constitutional

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v. Jacksonville, No. 89-09981 (Duval County, Florida Trial Court); *White Oak Tree v. Sarasota,* No. 88-4187 CA 01 (Sarasota County, Florida Trial Court; *Galeana v. City of Naples,* No. 89-1590 CA-01 (Collier County, Florida Trial Court); *DJ Leasing, Inc. v. Louisville,* No. 89CI02415 (Jefferson County, Kentucky Trial Court); *Miljack, Inc. v. City of Tulsa,* No. CJ 88-2629 (District Court, Tulsa County, Oklahoma); *Helmerich Drive-It- Yourself v. Erie,* No. 2592 CD 1988 (pending, Pennsylvania Supreme Court); *General Rent-A-Car v. Palm Beach,* No. 87-8345 (pending, 11th Circuit).

[14] R. 10-38. Instead, the Authority asserted that it "never contended that such use [of the terminal facilities] has anything whatsoever to do with justifying the fee." R. 5-10.

[15] R. 5-143-5.

[16] P. Ex. 54.

[17] P. Exs. 54, 182, 184.

validity of the Resolution adopted on July 27, 1982.[18] The parties stipulated that, pending final adjudication of the validity of the Resolution and until exhaustion of all appellate proceedings, Alamo would pay the gross receipts fees into an escrow account; pursuant thereto, $1.5 million is being held in escrow.[19] Following a non-jury trial, the district court held that the gross receipts fee provisions of the Resolution violated the Equal Protection Clause of the Fourteenth Amendment; it did not reach the other constitutional issues. A final decree was entered on December 17, 1985, enjoining enforcement of the fee provisions of the Resolution. R. 5-148. The Eleventh Circuit reversed and remanded for consideration of the remaining constitutional issues.[20] On remand, the parties stipulated to submit the case on the record of the prior trial.[21] By unpublished order, the district court rejected Alamo's Commerce Clause and Due Process Clause contentions and entered judgment in favor of the Authority. The Eleventh Circuit affirmed;[22] Alamo's petition for rehearing and suggestion for en banc consideration was denied.

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[18] P. Ex. 52.

[19] Additional off-Airport rental car companies also filed suit against the Authority challenging its constitutional validity. All parties entered into stipulations staying those proceedings and agreeing to abide by the final judgment in this suit brought by Alamo. R. 3-102; R. 3-105; R. 3-110.

[20] *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 825 F.2d 367 (11th Cir. 1987), *cert. denied* 484 U.S. 1063 (1988).

[21] R. 5-164.

[22] *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990).

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT'S HOLDING THAT THE GROSS RECEIPTS USER'S FEES DID NOT VIOLATE THE COMMERCE CLAUSE CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

The Eleventh Circuit held that user's fees could constitutionally be measured by whatever imputed benefits an interstate business derives from the existence of the Airport and permissive access to it, without regard to the Authority's costs in providing the facility or to the actual use of the facility by the fee payer. The holding is contrary to decisions of this Court requiring that user's fees be reasonably related to the Authority's costs in supplying the facility, taking into account the amount of the payer's use of it. The Eleventh Circuit's holding also conflicts with the First and Ninth Circuits.

The gross receipts user's fees imposed on Alamo cannot be upheld as a general revenue tax because the Authority has no taxing power. The Authority is, therefore, identically situated to the state in *Interstate Transit, Inc. v. Lindsey,* 283 U.S. 183 (1931) holding that a state user tax imposed on an interstate bus business measured by the earning capacity of buses violates the Commerce Clause.[23] Speaking for the Court, Justice Brandeis said:

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[23] When *Interstate Transit, Inc.* was decided, states could not constitutionally levy direct taxes on the privilege of conducting interstate business within a state; charges imposed on interstate commerce could only be upheld under the Commerce Clause as taxes or user's fees to recover interstate commerce's fair share of the state's cost in furnishing state-owned facilities. The constitutional bar was removed by *Complete Auto Transit, Inc. v. Brady,* 430 U.S.

> "The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is no sufficient relationship between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. [s.i.c.] We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory." 283 U.S. at 190.

The continuing vitality of *Interstate Transit* has been repeatedly confirmed in recent decisions. Thus, in *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981), the Court upheld a state tax on an interstate mining operation as a general revenue measure, while acknowledging that the same tax would not be upheld as user's fees. After citing *Interstate Transit,* the Court explained:

> "Because such [user] charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered' " .... 453 U.S. at 622, n.12 (quoting *Clark v. Paul Gray, Inc.,* 306 U.S. 583, 599 (1939)).

The user's fees imposed on Alamo were "not purportedly assessed to reimburse the [Authority] for costs incurred in providing specific quantifiable services ...." *Commonwealth Edison,* 433 U.S. at 622, n.12. Alamo produced uncontradicted evidence that the user's fees had no relationship to the cost of constructing, maintaining, and

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274, 288-89 (1977), permitting such taxes if they were non-discriminatory, not excessive, and rationally related to legitimate state ends. The restrictions on user's fees, however, remained unchanged.

operating the Airport and were not intended to do so. The Authority's Executive Director testified that it was not providing Alamo with any services, and it was "unconcerned about costs since we were not providing services nor facilities."[24]

The validity of user's fees, attacked on Commerce Clause grounds, was again before the Court in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). At issue was a $1 head tax levied by a municipally-owned airport on all emplaning passengers to defray airport costs. Analogizing the tax to a highway toll, the Court sustained the tax because it was a fee based on a " 'uniform, fair, and practical standard' relating to public expenditures" in constructing and maintaining the airport facility; the taxpayer offered no evidence that the fee was disproportionate to the use made or that the amount of the tax was more than necessary to meet specific past and current airport deficits, and the classification of the persons subjected to and exempted from the tax was not arbitrary. 407 U.S. at 716, 717-18, 720.[25]

Unlike *Evansville,* Alamo introduced uncontradicted evidence that the gross receipts user's fees were unrelated to the Authority's costs in maintaining the facility. The user's fees were not uniform: The amount of the fees

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[24] R. 10-81-83. The Authority asserted that it "never contended that such use [of the terminal facilities] has anything whatsoever to do with justifying the fee." R. 5-10.

[25] In response to *Evansville,* Congress, in 1973, foreclosed states from levying user taxes or fees on airline passengers. 49 U.S.C. § 1513(a) (forbidding states to levy or to collect "a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce.") Accordingly, such state fees or taxes are now preempted. *Aloha Airlines v. Director of Taxation of Hawaii,* 464 U.S. 7, 11-15 (1983).

did not vary with the amount of use that Alamo made of the Airport; they varied with the amount of its patrons' use of rental cars outside the Airport. The gross receipts fees are disproportionate to the Authority's costs and to Alamo's use of the Airport. The classification of persons subjected to gross receipts user's fees and those who were exempted was arbitrary. Off-Airport businesses, other than car rental companies, using shuttles to transport customers from the Airport to their businesses, were not charged fees based on their gross receipts; they were subjected only to flat fees that were a small fraction of those extracted from Alamo. Although there are obvious differences between off-Airport hotels, parking lots, and car rental agencies, those differences have nothing to do with the amount of use that each made of the Airport or the costs of furnishing Airport facilities to any of them.

The Commerce Clause principles stated in *Interstate Transit* were reaffirmed in *American Trucking Ass'ns, Inc. v. Scheiner,* 483 U.S. 266 (1987), striking down fees levied by the State on interstate trucks because the differences between flat taxes imposed on interstate trucks and those imposed on intrastate trucks were based neither on differences in highway use nor differences in the costs of providing such facilities to each. The Court distinguished *Evansville* on the ground that the taxing municipality had shown in *Evansville* that all passengers subjected to the same flat tax made the same use of the Airport facilities, but no such showing had been made in *Scheiner. Id.* at 289-90. The *Scheiner* scheme did not purport to approximate fairly the cost of furnishing the roads to interstate trucks as compared with the cost of furnishing the roads to intrastate trucks. *Id.* at 290.

In reaching its conclusion in this case, the Eleventh Circuit disregarded *Interstate Transit* and *Scheiner,* over-

looked the fact that the Authority had no taxing power, and interpreted the "benefit" language of *Evansville* to mean that user's fees can be measured by whatever financial benefits an interstate business may derive from the existence of an airport to which it had access. According to the Eleventh Circuit, *Evansville* meant that the Authority could constitutionally impose a $1000.00 head tax on one emplaning passenger and a $1.00 head tax on another if the first interstate passenger using the airport took a successful business trip and the second passenger took a vacation. *Evansville* says nothing of the kind.

The Eleventh Circuit's reasoning conflicts with that of other circuits. Thus, in *American Airlines, Inc. v. Massachusetts Port Authority,* 560 F.2d 1036 (1st Cir. 1977), an airline sought to overturn an increase in landing fees on the ground that the costs of improvident runway construction should not be taken into account in assessing fees to it because the airline derived no benefit from the construction, relying on the "benefit language" from *Evansville.* Rejecting that argument, the court observed that it rested on "isolated language" in *Evansville. Id.* at 1038-39. Citing numerous decisions of this Court, it explained that in all of those cases, the "focus [is] on whether the revenue raised by the fee roughly approximates the cost of providing the facilities and services." *Id.* at 1038.

The court also accurately described the unacceptable impact of adopting the Eleventh Circuit's benefit theory. The court stated that permitting users' fees to vary with benefits is administratively impracticable and would impose serious burdens on the courts by involving them in attempts "to adjudicate the quantum or benefit received by each user, the normative ratio between benefit and tax, and the amount of reasonable costs which could be properly allocated to the users." *Id.* at 1039.

The court could also have added that the resulting fee structure would be wildly different from highway toll charges to which *Evansville* analogized the head tax.

The Ninth Circuit has also rejected the Eleventh Circuit's benefit theory in applying the Commerce Clause to user's fees. In *Western Oil & Gas Ass'n v. Cory,* 726 F.2d 1340 (9th Cir. 1984), *aff'd by an equally divided court,* 471 U.S. 81 (1985), California demanded user's fees, labeled "rents," for an oil and gas pipeline passing through submerged State lands measured by the volume of oil and gas flowing through the line. The court concluded that the volumetric charge was invalid under the Commerce Clause because it was "not directed toward compensating the State for the use of the land. . . ." *Id.* at 1344. Relying on *Interstate Transit,* the court held that no sufficient relationship existed between the measure employed and the extent of use of state property. The volumetric formula was "a disguised revenue raising measure," that reflected, not "the value to the State of its land, but the maxium amount of revenues [the State] can extract from interstate commerce by utilizing its strategic geographic position." *Id.* at 1345.

II.

THE FEES IMPOSED ON ALAMO VIOLATED THE COMMERCE CLAUSE BECAUSE THEY ARE UNREASONABLY LARGE AND UNJUSTLY DISCRIMINATORY

Even if it is assumed, *arguendo,* that the Authority could escape invalidation under *Interstate Transit,* the fees imposed on Alamo fail to pass constitutional muster

because the user's fees are grossly excessive and discriminatory.

A. The Fees Are Unconstitutionally Excessive

Alamo carried its initial burden of proving that the fees imposed upon it exceeded the Authority's costs. Indeed, Alamo established that no relationship existed between the fees exacted and the Authority's costs.

The Court addressed a similar question in *Great Northern Railroad Co. v. Washington,* 300 U.S. 154 (1937), in which the railroad challenged the validity of state charges measured by 1/10th of 1 percent of the railroad's gross operating revenues, arguing that the fees were unreasonably burdening interstate commerce. The State did not keep separate accounts to relate its costs to the railroad's aliquot share of the State's service. In striking down the scheme, the Court said:

> "[T]he State is at liberty to intermingle duties involving costs properly charged to the railroads, with others involving costs not so chargeable, but if it does so, and the exaction is challenged, it must assume the burden of showing that the sums exacted from the appellant do not exceed what is reasonably needed for the services rendered. The State failed to carry this burden." *Id.* at 168.

As in *Great Northern Railroad Co.,* the Authority did not carry its burden. It was undisputed that the only use that Alamo makes of the Airport is to pick up its prereserved customers at the designated curb. The Authority does not supply Alamo's customers. It has no control over air travelers' destinations nor their choices in selecting auto rental companies in continuing their interstate journeys. Alamo's gross receipts are not determined by its access to the Airport, but by its customers' choices con-

cerning their interstate destinations and the length of time they want to use rental cars outside the Airport. The Authority produced no evidence that fees of more than $200,000 per annum for permission to pick up Alamo's customers at curb side were reasonable.

B. The Resolution on Its Face and as Applied is Unconstitutionally Discriminatory

The Authority's user's fees scheme unreasonably discriminates against Alamo's interstate business to favor its own intrastate revenues and other intrastate businesses using the Airport. The Authority's intent in adopting the Resolution was to lessen competition with its car rental tenants to enhance its cut from its tenants' gross receipts. Although the Authority had a legitimate interest in protecting Airport revenues to defray its costs, it could not promote that interest by imposing unreasonable burdens on interstate commerce.[26] Moreover, the effect of the Resolution was to impose artificial strictures on the economic pattern of the automobile rental industry, on interstate airline passengers, and on Alamo. The Authority introduced no evidence that its user's fees scheme promoted economic efficiencies in the automobile rental industry.

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[26] *Cf. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (state excise taxes on wholesale liquor exempting certain locally produced liquor unconstitutional under Commerce Clause, because the tax discriminated against interstate commerce by providing direct commercial advantage to local business); *Armco Inc. v. Hardesty*, 467 U.S. 638, 642-46 (1984) (state wholesale gross receipts tax violated Commerce Clause because intrastate sales of locally made products exempted; gross sales tax imposed on interstate commerce could not be deemed compensatory for manufacturing tax imposed on intrastate competitors of the interstate taxpayer); *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232, 243-44, 247 (1987) (similar to *Armco*).

The Court was presented with an analogous Commerce Clause problem in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). At issue was the constitutionality of an Arizona statute requiring that cantaloupes grown in Arizona be packed for sale in containers approved by a State supervisor. A State supervisor prohibited plaintiff from shipping its Arizona cantaloupes to its California packing shed 31 miles from the harvest site. *Id.* at 138. This Court held that the order violated the Commerce Clause. Even when a statute regulates "even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, . . . the extent of the burden [on interstate commerce] that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* at 142.

The Court rejected the State's argument that the statute was enacted for the legitimate purpose of protecting the reputation of Arizona cantaloupe growers because the statute effectively required plaintiff to build and operate an unneeded packing plant in Arizona. *Id.* at 180-81. Statutes having a necessary tendency to impose artificial restrictions on the economic pattern of an industry are constitutionally suspect under the Commerce Clause, and, absent a compelling state interest, such regulatory schemes will not be upheld. *Id.* at 145-46.

In our case, the Authority adopted the Resolution to impose artificial economics on non-tenant car rental companies and their customers by arbitrarily increasing the price for renting cars from non-tenant companies. The Authority's interest in enhancing its intrastate revenue from its tenants is not compelling, and the Authority can raise revenue to defray its costs by other means that are less damaging to interstate commerce, such as charging

non-discriminatory, reasonable fees to non-tenant users, intra- and interstate.

The Authority exacts no gross receipts user's fees from intrastate businesses no matter how much benefit such businesses derive from Airport access or how many trips to the Airport are made. If these businesses use taxis or limousines to reach the Airport, they will pay fares determined, in part, by the flat user's fees imposed on limousine and taxicab companies. When intrastate businesses' personnel transport themselves to or from the Airport by private vehicle, they pay no user's fees, directly or indirectly.

The Authority could not directly impose user's fees on airline passengers measured by a percentage of the amount of rental they paid non-tenant car companies.[27] That scheme would plainly violate the Anti-Head Tax Act, 49 U.S.C. § 1513, and *Evansville* as well.[28] The Authority knew that the user's fees imposed on Alamo were passed on in the form of surcharges to airline passenger customers and that was the purpose of the Resolution; it should not be permitted to do indirectly that which it could not do directly.

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[27] 49 U.S.C. § 1513(a) preempts the states from imposing any user's fees on airline passengers.

[28] *Cf. Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 13-14 (1983) (property tax measured by gross receipts of airlines preempted by 49 U.S.C. § 1513(a)). *E.g., Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262, 1268 (7th Cir. 1984).

49 U.S.C. § 1301(23) defines "interstate air commerce" to mean carriage by aircraft of persons "whether such commerce runs wholly by aircraft or partly by aircraft and partly by other forms of transportation."

Congressional intent in enacting the Anti-Head Tax Act to prevent airport authorities from levying such indirect user's fees on airline passengers was clearly stated in 1984 in the House Committee on Appropriations' Report issued in connection with funding the Department of Transportation:

> "[C]ertain airport authorities eligible to receive airport grant funds have begun to charge gross receipt fees to non-tenant service providers such as . . . rental car companies for access to the airport . . . . [49 U.S.C.] § 1513 . . . prohibits direct or indirect fees 'on persons traveling in air commerce or on the gross receipts derived therefrom'. Gross receipts fees on non-tenant service providers may violate this provision if they do not bear a reasonable relationship to the actual use of the airport roads and ramps by a non-tenant user. In contrast, a clearly permissible user fee is one which is imposed by an airport authority to cover operating and maintenance costs attributable to the actual use of such roads and ramps by non-tenant service providers."[29]

CONCLUSION

This Court has repeatedly applied the Commerce Clause to invalidate user's fees or taxes that are not reasonably related to the state's costs in supplying a public facility to interstate commerce and to the actual use of the facility by the payer. The gross receipts of a

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[29]H.R. Rep. No. 98-859, p. 37 (1984), *reprinted* in United States Congressional Serial Set, No. 13593.

"[T]he view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value." *Bell v. New Jersey*, 461 U.S. 773, 784 (1983).

user are insufficiently related either to the costs or to the payer's use of the facility to withstand constitutional scrutiny. As applied to Alamo, the arbitrariness of the Authority's Resolution is patent because the record establishes that the fees were adopted without regard to either the Authority's costs or to Alamo's usage.

Even if the scheme were not facially arbitrary, Alamo carried its burden of proving that the fees were excessive; the Authority did not carry its burden of proving otherwise. Finally, Alamo proved that the user's fees discriminated against interstate commerce in favor of the Authority's intrastate revenues and that means less burdensome to interstate commerce exist to vindicate any legitimate state interest.

Accordingly, Alamo prays that its Petition for Certiorari be granted.

Respectfully submitted,

HUFSTEDLER, KAUS &
BEARDSLEY
SHIRLEY M. HUFSTEDLER

By: SHIRLEY M. HUFSTEDLER
Attorneys for Petitioner,
Alamo Rent-A-Car, Inc.

APPENDIX A

No. 88-4023.

United States Court of Appeals,
Eleventh Circuit.

July 19, 1990.

ALAMO RENT-A-CAR, INC., a Florida corporation, Plaintiff-Appellant,

v.

SARASOTA-MANATEE AIRPORT AUTHORITY, a political subdivision of the State of Florida, Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and CLARK, Circuit Judges, and ATKINS*, Senior District Judge.

KRAVITCH, Circuit Judge:

Alamo Rent-A-Car ("Alamo"), having lost in this court on its equal protection claim, now appeals the district court's entry of judgment against it on its commerce clause and due process clause claims brought against the Sarasota-Manatee Airport Authority ("Authority"), the operator of the airport. We affirm the district court, with one minor exception.

I. BACKGROUND

Alamo, a rental car agency, located its operation off the premises of the Sarasota-Bradenton Airport ("airport")

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*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

in 1978. At that time, five other rental companies had "on-airport" concessions which had been obtained through competitive bidding. In 1981, without permitting competitive bidding, the Authority rolled over the existing concession contracts, and in July 1982 the Authority passed a resolution requiring the off-airport car rental companies to pay the Authority ten percent of their gross receipts obtained from customers who came from the airport. In addition, the resolution prohibited the off-airport car rental companies from soliciting business in the airport, and forbade them to pick up passengers who lacked a reservation. The resolution also prevented car rental companies from having more than one "courtesy" van at the airport terminal at any time.

Car rental companies located at the airport also pay a ten percent fee to the Authority. The on-airport companies rent counter space and parking spaces from the Authority, and they enjoy the accompanying exposure to walkup customers.

Alamo, alleging violations of the equal protection, commerce, and due process clauses of the Constitution, and the due process clause of the Florida Constitution, obtained an injunction from the district court enjoining the enforcement of the Authority's resolution on the basis of the equal protection claim. This court, however, reversed on the equal protection claim, and remanded to the district court for consideration of Alamo's due process and commerce clause claims. *Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367 (11th Cir. 1987). The district court concluded that the resolution violated neither the commerce clause, nor due process.

II. COMMERCE CLAUSE

Alamo challenges the Authority's resolution, asserting that the regulations violate the commerce clause of the Constitution. We will first consider the fees charged Alamo by the Authority.

(1) The general rule governing commerce clause review of state statutes is that

> [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970).

(2) Unquestionably, maintenance of the airport facility is a legitimate local public interest. Indeed, assuring an adequate airport facilitates rather than burdens interstate commerce. *Cf. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 92 S.Ct. 1349, 1354, 31 L.Ed.2d 620 (1972) ("[A] charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike .... The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense."). Furthermore, any burden on interstate commerce is incidental rather than deliberately imposed. No greater fee is levied on interstate travel as distinguished from intrastate travel.

The Court has noted that user fee cases are not measured by the same standard as general revenue tax cases, although in either case one of the purposes of the collection of money is to provide revenue for the collecting entity. In the case of a user fee, however, the revenue collection provides for certain services or benefits to the user. *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 620-23 & n. 12, 101 S.Ct. 2946, 2955-56 & n. 12, 69 L.Ed.2d 884 (1981).[1] The Court has declared that because user fees "are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, [the court has] required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered....'" 453 U.S. at 622-23 n. 12, 101 S.Ct. 2956 n. 12 (quoting *Clark v. Paul Gray, Inc.,* 306 U.S. 583, 599, 59 S.Ct. 744, 753, 83 L.Ed.2d 1001 (1939)).

A. *User Fees*

(3) In evaluating whether a user fee contravenes the commerce clause, we follow the Supreme Court's analysis in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines:* first, the fee charged must "reflect a fair, if imperfect, approximation of the use of facilities for whose

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[1]The Court in *Commonwealth Edison Co. v. Montana,* accepting the State's characterization of its coal severance fee as a general revenue tax, explicitly declined to apply the tests delineated by the Court in evaluating user fees or "taxes" "designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." 453 U.S. at 621, 101 S.Ct. at 2955. The Authority in the instant case, however, relies on the user fee justification, and accordingly we must apply the relevant constellation of cases concerning user fees to which the Court directs attention in *Commonwealth Edison Co. v. Montana.*

benefit they are imposed," 405 U.S. at 717, 92 S.Ct. at 1355; second, the fee must not "be excessive in relation to costs incurred by the taxing authorities." *Id.* at 719, 92 S.Ct. at 1357.

1. Fair Approximation of Use

[4] Alamo contends that the only "use" it makes of the airport is to drive on the airport roads in order to pick up customers. Therefore, Alamo asserts, the user fee should be limited to a pro rata road use fee. Instead, the user fee is based on the receipts Alamo obtains from its airport customers. The Authority responds that Alamo is reaping the benefit of the entire airport facility because in the absence of the airport Alamo would lose a significant portion of its business. The parties are locked in battle over whether the enjoyment of the benefits conferred by the existence of the airport can constitute "use." Because Alamo does enjoy the indirect "use" of the entire airport facility through the travelers it services, we conclude that the user fee is a fair, albeit imperfect, approximation of use.

In *Evansville-Vanderburgh Airport Authority District,* the Supreme Court held that a one dollar head tax on each enplaning passenger did not violate the commerce clause, despite the fact that it was not a perfect measure of use.[2] Here, as there, the statute does not require that all users of the airport pay the fee. In *Evansville-Vander-*

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[2]In response to *Evansville-Vanderburgh,* Congress passed the Federal Anti-Head Tax Act, which prohibited levying fees on "persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . . ." 49 U.S.C.App. § 1513(a).

The congressional action left the Court's commerce clause analysis undisturbed.

burgh, myriad categories of airport users were excluded from paying the head tax, despite the fact that they "used" the airport facilities. For example, non-passengers meeting or seeing off passengers were not required to pay the head tax. The Court further stated that "since the visitor who merely sees off or meets a passenger confers a benefit on the passenger himself, his use of the terminal may reasonably be considered in the passenger's fee." 405 U.S. at 718, 92 S.Ct. at 1356. Significantly, the Court did not attach great importance to whether the fee was levied on the passenger or the airline because in either case it was the use of the airport facilities that gave rise to the obligation to pay the fee. 405 U.S. at 713-15, 92 S.Ct. at 1354.[3] Here the fee is levied against Alamo, and Alamo asserts that it is simply passing the fee on to the passenger in the form of a ten percent surcharge.

Recognizing that no formula to compute the fee for use of a state facility would be perfect, the Court made clear that so long as the fee was "based on some fair approximation of use or privilege for use, as was before us in *Capital Greyhound* [*Lines v. Brice,* 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053 (1950)], and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." 405 U.S. at 716-17, 92 S.Ct. at 1355.[4]

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[3]At the Evansville-Vanderburgh Airport, the fee was collected by the airline, which was permitted to retain a small percentage to offset its processing costs.

[4]Wary of the Court's admonition in *Commonwealth Edison Co. v. Montana* to avoid reliance on general revenue tax cases when adjudicating a user fee case, we note that the Court itself in *Evansville-*

In *Capitol Greyhound,* the Court, faced with a Maryland title tax based on the cost of the vehicle, pragmatically noted that the tax "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted." 339 U.S. at 545, 70 S.Ct. at 808. There the bus company, cleaving to a position similar to that espoused here by Alamo, argued that the tax "should be forbidden by the commerce clause because it varies for each carrier without relation to road use." 339 U.S. at 545, 70 S.Ct. at 808. Although Maryland also imposed a mileage tax, the Court suggested that even where the state ignores "such a key factor as mileage," the statute can withstand commerce clause scrutiny. 339 U.S. at 547, 70 S.Ct. at 809. The Court was concerned that the administrative costs of perfect fairness would be exorbitant:

> Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content

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Vanderburgh, a proto-typical user fee case, found *Capitol Greyhound* pertinent. Furthermore, *Capitol Greyhound* involved a tax that was construed as being for the purpose of compensating the state for the privilege of using the state's roads. 339 U.S. at 543-44, 546-48, 70 S.Ct. at 807, 809.

The Supreme Court continues to apply *Evansville-Vanderburgh* and its incorporated reference to *Capitol Greyhound* in the user fee context, although *Capitol Greyhound* is now doubtful authority in the road tax realm. *See American Trucking Ass'ns, Inc. v. Scheiner,* 483 U.S. 266, 107 S.Ct. 2829, 2843-44, 97 L.Ed.2d 226 (1987) (contrasting neutral $1 fee with flat tax that discriminated against out-of-state vehicles). *But see Scheiner,* 483 U.S. at 298-99, 107 S.Ct. at 2848 (Justice O'Connor stating in dissent that the majority was overruling holding of *Capitol Greyhound*).

> with "rough approximation rather than precision." Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government.

339 U.S. at 546-47, 70 S.Ct. at 809 (citation and footnote omitted).

The Court tested its ruling by the touchstone of its "general rule that taxes like [the Maryland vehicle cost title tax] are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." *Id.* We also use that touchstone to decide whether the fee charged Alamo is in excess of fair compensation for the privilege of picking up passengers at the airport.

Alamo argues that the fee charged cannot be a fair approximation of its use of the airport because the amount of the fee varies in proportion to the revenue generated by Alamo's airport customers. Proffering the example of two twins who arrive at the airport on the same day, Alamo notes that if one twin rents a car for only one day whereas the other twin rents a car for seven days, although each twin has made equal use of the airport, one is charged a much larger user fee than the other (based on the total rental car bill); therefore, Alamo submits, the fee does not (and cannot be construed to) represent a fair approximation of Alamo's use of the airport.

In light of *Evansville-Vanderburgh* and *Capitol Greyhound,* however, we must disagree. In *Capitol Greyhound,* the title fee charged varied with the cost of the vehicle, not the use of the roads; nevertheless, the Court upheld the statute against a commerce clause challenge. In *Evansville-Vanderburgh,* the Court emphasized that so long

as the charge was based on some "fair approximation of use or privilege for use" and is not "excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facility by individual users." Although imprecise in particular applications, the Authority's decision to measure Alamo's use of the airport facility by the gross receipts generated from Alamo's airport customers is not irrational. The Authority could reasonably conclude that the ten percent fee on average represents Alamo's use of the airport facility. It stands to reason that *in general* the more money Alamo makes from airport passengers, the more trips Alamo has made to the airport.[5] Admittedly, the formula is imperfect; it is not, however, an *unfair* approximation.

Furthermore, the "benefit conferred" language of *Evansville-Vanderburgh* suggests that a broad construction of use is appropriate where the benefit derived by the user depends on the existence of the entire government-provided facility. The one dollar head charge, although not necessarily related to actual use of particular airport facilities, survived challenge. A jumbo jet departing in bad weather with one passenger will pay a much smaller "user fee" than a fully loaded small jet taking off under clear skies, despite the fact that the jumbo jet has created more wear and tear and has required the use of sophisti-

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[5]This court in its previous opinion concerning Alamo's equal protection claim noted that the use fee schedule is "well tailored" to reflect the "different benefits the various . . . users received from the airport." 825 F.2d at 371. "For example, the fee applicable to off-airport car rental companies is ten percent of the revenue attributable to customers who arrive at these companies' places of business in a courtesy vehicle. Thus, car rental companies that rarely obtain passengers from the airport pay a low fee." *Id.* at 371 n. 4.

cated airport navigational aids. *Cf.* 405 U.S. at 717-19, 92 S.Ct. at 1356 (distinguished between light private aircraft and heavier commercial aircraft). Similarly, although the two "twins" may pay a fee that does not exactly measure each's actual use of the airport facility, that does not in and of itself make the fee a violation of the commerce clause.

Our approach here is consonant with *Toye Bros., Yellow Cab v. Irby,* 437 F.2d 806 (5th Cir.1971),[6] where the court held that a fee of ten percent of a taxi cab company's gross receipts for access to the airport was not excessive and did not violate the commerce clause, despite the fact that others having access to the airport paid a flat fee. There, as here, the fee charged varied with the money obtained by virtue of the carrier's access to the airport, rather than in strict relation to the carrier's use of the physical airport facilities.

The Supreme Court precedent is clear, and we must follow it, notwithstanding any cases to the contrary decided in other circuits. Alamo argues that it is being charged for the business benefit it derives from the airport's existence, that such a fee violates the commerce clause, and that the Ninth Circuit has rejected "business benefit" as a fair approximation of use. *See Western Oil and Gas Ass'n v. Cory,* 726 F.2d 1340 (9th Cir.1984), *aff'd by an equally divided Court,* 471 U.S. 81, 105 S.Ct. 1859, 85 L.Ed.2d 61 (1985). *Cory* does not control the disposition of this case because of the strikingly different facts here.

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[6]The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

In *Cory,* the state charged "rent" based on the volume of oil passing through an oil company pipeline located on state land. In applying the same Supreme Court precedents as we do here, the Ninth Circuit noted that it "was undisputed that the lands leased to plaintiffs are unimproved and that no services or facilities are provided by the State in conjunction with the lease." 726 F.2d at 1344. In contrast, Alamo is receiving the use of improved airport facilities, including roads upon which its vans travel.

In sum, the user fee is a fair, albeit rough, approximation of Alamo's "use" of the airport.

2. Reasonableness of Fees in Relation to Costs

[5] Having determined that the fee against Alamo is assessed as a fair approximation of use, we must consider whether the fees nevertheless are excessive in relation to costs incurred by the Authority. *See Evansville-Vanderburgh v. Delta Airlines,* 405 U.S. at 719-21, 92 S.Ct. at 1357. Alamo argues that because it is conceded that its vehicles comprise no more than one percent of the airport vehicular traffic, Alamo should pay at most one percent of the airport's operating expenses. Even were we to adopt that approach, the relevant measure would not be what percentage Alamo comprises of the total vehicular traffic, but rather what percentage Alamo comprises of those vehicular users that the Authority has decided to charge. As discussed above, the fact that different users are charged different fees or that certain users are not charged at all does not invalidate the scheme. *See Evansville-Vanderburgh,* 405 U.S. at 715-19, 92 S.Ct. at 1355-56 (majority of airport users exempted from fee in whole or in part).

Alamo argues that the Authority can only "recoup" expenditures, thus implying that the Authority is restricted to seeking reimbursement for funds already expended to build and maintain the airport facility, and that the Authority is forbidden from levying a fee to fund future development. Alamo, however, misconstrues the nature of the benefit conferred. While it is true that the Authority was retaining earnings during fiscal years 1982 and 1983, the Authority was contemplating an expansion of the airport facility in accordance with the Master Plan Report, and the financial projections supplied the Authority reflected that, after factoring in debt service on the Authority's bonds and other operating expenses, the income generated by the off-airport rental car concession would be no more than 4.66% of the Authority's total operating expenses by fiscal year 1988.

We note that in *Evansville-Vanderburgh,* the Supreme Court approved consideration of bond costs in conducting its analysis of the relation of fees to costs. *See* 405 U.S. at 719-21, 92 S.Ct. at 1357. Further, we believe that given the long term nature of maintaining and developing an airport, it was appropriate for the Authority to factor in future development plans when setting user fees. To ignore the future expense of developing and expanding the airport to meet increased demands, would increase rather than mitigate burdens on interstate commerce. See 405 U.S. at 713-15, 92 S.Ct. at 1354 (fee may defray construction and maintenance costs of state-provided facility). Accordingly, we conclude that the fee charged Alamo was not excessive in relation to the cost borne by the Authority in providing the facility.

B. *Single Van Restriction and Reservation Requirement*

[6] The resolution prohibits Alamo from having more than one van on the airport premises at a time, and Alamo argues that the resolution thus unduly burdens interstate commerce. Although Alamo may be adversely affected, the commerce clause "protects the interstate market, not particular firms, from prohibitive or burdensome regulations." *Executive Town and Country Services v. City of Atlanta,* 789 F.2d 1523, 1526 (11th Cir.1986) (quoting *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127-28, 98 S.Ct. 2207, 2215, 57 L.Ed.2d 91 (1978)). The single van restriction was designed to avoid the local problem of courtesy van congestion at the airport, and the restriction poses no more than an incidental burden on interstate commerce. We do not believe that the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . .," *Pike v. Bruce Church, Inc.,* 397 U.S. at 142, 90 S.Ct. at 847 (citation omitted), and we note that "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* Following the analysis laid out in *Executive Town and Country Services,* we conclude that the single van restriction imposes only a minimal burden on interstate commerce, at most requiring deplaning passengers who want to rent an off-airport car to wait a little longer for the van to pick them up. Moreover, the single van restriction's purpose is to ameliorate the problem of traffic congestion, and the restriction is neatly tailored to do just that. Alamo has not proffered a plan to reduce curbside traffic snarls that is less burdensome on "interstate activities." Accordingly, we conclude that the single van restriction does not offend the commerce clause.

[7] The reservation requirement, however, does run afoul of the commerce clause. Although the burden on interestate commerce created by the reservation requirement is not great, we can discern no local purpose that the requirement is designed to serve, nor are "putative local benefits" proffered by the Authority. The Authority contends that the burden is slight, that Alamo has not been inconvenienced, and that customers can easily make a reservation from a phone located in the airport terminal. Although those assertions may well be true, in the complete absence of any local purpose whatsoever relied upon by the Authority, we must conclude that the burden on interstate commerce is excessive. *See Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 101 S.Ct. 715, 728-29, 66 L.Ed.2d 659 (1981); *Pike v. Bruch Church, Inc.,* 397 U.S. at 142, 90 S.Ct. at 847; *Executive Town and Country Services,* 789 F.2d at 1526-27.

III. DUE PROCESS

[8] The district court properly concluded that Alamo's claim that the ten percent fee violates due process was foreclosed by the prior panel opinion of this court where, in analyzing Alamo's equal protection claim, we held that the fee was rationally related to a legitimate state interest. 825 F.2d at 373-74. A regulation rationally related to a legitimate government purpose under equal protection will almost always meet the rational basis test of due process. *See Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 467, 470 n. 12, 101 S.Ct. 715, 727 n. 12, 66 L.Ed.2d 659 (1981) (Minnesota law which does not violate equal protection a *fortiori* does not violate Fourteenth Amendment due process); *Executive Town & Country Services,* 789 F.2d at 1528. We need not repeat what was said in the prior panel opinion; given the rational relationship to a

legitimate state interest, in this case the ten percent fee does not violate substantive due process.

We must also address Alamo's contention that being excluded from competitive bidding for an on-airport location violated the standard of "fair play" exacted by substantive due process under the United States and Florida Constitutions.[7] In support of its position Alamo directs our attention to three cases, none of which is persuasive. First, Alamo asserts that the Authority's "lock out" violated the overarching standard of "fair play" required by *Galvan v. Press,* 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954). In *Galvan,* however, the Court deferred to Congress' authority to regulate aliens entering the United States; that case provides no relevant yardstick against which to measure the alleged violation of "fair play" in this context. Next Alamo turns to a pair of Florida cases in support of its claim that the Authority's actions violate the due process clause of the Florida Constitution, Article I, section 9: *Department of Insurance v. Dade County Consumer Advocate's Office,* 492 So.2d 1032 (Fla.1986) and *Liquor Store v. Continental Distilling Corp.,* 40 So.2d 371 (Fla.1949). These cases are entirely inapposite. In *Department of Insurance,* the Florida Supreme Court struck down a Florida statute that prohibited insurance agents from accepting lower commissions from their customers than the commission set by the insurer; the court reasoned that the statute "unnecessarily limit[ed] the bargaining power of the consuming public. . . ." 492 So.2d at 1033. Here the consuming public

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[7]The Authority contends that Alamo has abandoned its claim under the Florida Constitution for failure to raise the issue in its brief. We are constrained, however, on the basis of Alamo's citation of Florida constitutional authorities, to disagree, although the bare citations are slender reeds upon which to hang an entire constitutional argument.

continues to have a choice between on-airport and off-airport sources of rental cars, and we do not see how the exclusion of Alamo from the opportunity to bid competitively for an on-airport concession restricts the right of the *consumer* to bargain with the rental car company. *Liquor Store* is no more helpful to Alamo as it involved a "price fixing statute" to maintain retail prices; our attention has not been directed to any part of the record to support a conclusion that rental car prices in the Sarasota-Bradenton area have been "fixed."

In the absence of any authority to the contrary, we conclude that the Authority's failure to hold competitive bidding for the on-airport concessions prior to imposing the user fee did not violate the due process clause of either the United States or Florida Constitutions.

IV. CONCLUSION

The Authority's resolution imposing on Alamo a fee of ten percent of gross receipts derived from airport customers does not violate the due process clause of the Florida or United States Constitution, nor does it violate the commerce clause of the United States Constitution. The resolution's single van restriction is rationally related to a valid local purpose, mitigating airport traffic congestion, and is, therefore, acceptable under the commerce clause. The reservation requirement, however, serves no local purpose, and therefore violates the commerce clause as it burdens interstate commerce without any local interest to balance the scales. Accordingly, the district court is AFFIRMED, except insofar as it ruled that the resolution's reservation requirement did not violate the commerce clause. The case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

NO. 88-4023

In The United States Court of Appeals
For The Eleventh Circuit

ALAMO RENT-A-CAR, INC.,
a Florida Corporation,
Plaintiff-Appellant,

VERSUS

SARASOTA-MANATEE AIRPORT AUTHORITY,
a political subdivision of the State of Florida,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion July 19, 1990, 11 Cir., 198 , F.2d).
(October 17, 1990)

Before KRAVITCH and CLARK, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PHYLLIS KRAVITCH
United States Circuit Judge

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

October 17, 1990

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 88-4023 Alamo v. Sarasota-Manatee Airport
DC DKT NO.: 88-00836 CIV-T-10

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

MIGUEL J. CORTEZ,
Clerk

Reply to: Ola Solomon
(404) 331-3843